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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. [illegible].

JAMES GALLICK,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD CO.,
Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT.

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 765.

JAMES GALLICK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD CO.,

Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT.

INTRODUCTORY.

The petition for writ of certiorari was directed primarily to the issue of whether the proofs were such as to entitle respondent to final judgment *on a directed verdict*. This was the *sole* basis of the judgment of the Court of Appeals for Cuyahoga County in reversing the judgment of the trial court for petitioner entered upon the special verdict of the jury. Much of respondent's brief opposing this petition for a writ of certiorari is directed to the proposition that the special findings *by the jury* were such as to entitle respondent to judgment as a matter of law. Inasmuch as the Court of Appeals for Cuyahoga County specifically reviewed all claims of error by respondent pertaining to the findings of the jury and found none prejudicial to the rights of respondent, this issue was not discussed in the petition for a writ to this Court. Petitioner now feels impelled to briefly take issue with certain propositions being advanced by respondent in the instant cause.

THE EVIDENCE.

Contrary to the assertion of respondent (Page 3 of its brief), the unsanitary condition complained of forming the basis of petitioner's cause of action was not that the dead pigeons, rats and insects had been observed *upon occasion*. There was an abundance of evidence that the presence of dead pigeons, rats and insects in and about the pool of water was a constant, continuous, recurring condition which respondent's maintenance department failed to correct despite complaints of the same (R. 23, R. 24, R. 44, R. 51, R. 52, R. 99).

While petitioner readily admitted that he never visually observed the insect which bit him, there was an abundance of circumstantial evidence to conclude that he was in fact bitten by an insect while performing occupational duties for respondent opposite this cesspool complained of. The lesion had the feel of a bite (R. 109). The object crushed had the feel of an insect (R. 110). There was immediate pain at the site of the bite (R. 111). The welt had the look of a bite (R. 64). Insects were seen on the ground at the cesspool of the approximate size which petitioner felt in his pants leg (R. 257). On November 2, 1954, when visited by respondent's claim agent in the hospital, petitioner made out a Form 790 accident report which refers to the cause of injury as "insect bite back of left leg at knee joint." (R. 265, 266.) The admitting histories at both Marymount Hospital and Cleveland Clinic Hospital which are part of the record refer to an insect bite at work. The jury specifically found that petitioner was bitten by an insect while performing his usual and customary work duties near or about the Columbus Road Bridge (See Page 51, Petition for Writ of Certiorari, Exhibits J, K, and L). Even the Court of Appeals for Cuyahoga County was satisfied that there was ample proof

of the bite as claimed. Thus, the following is from the opinion of that court (p. 42, pet. for writ):

> "We have sufficient credible evidence to conclude, *as did the jury*, that Mr. Gallick suffered a 'bite' on railroad property by some insect while working for that railroad. We have an abundance of testimony that from such 'bite' severe consequences to Mr. Gallick have ensued." (Emphasis added.)

Respondent makes much of the evidence that the precise medical etiology of all of these ulcers has never been identified (Page 4, respondent's brief). However, the record abounds with testimony that the physicians, specifically Drs. Ippolito and Anderson, who treated petitioner for many years for the illness involved, never questioned that the etiology was connected to the unsanitary cesspool maintained by defendant and resulted from the insect bite. When first examined by Dr. Ippolito on September 16, 1954, there was only the one lesion in back of the knee (R. 282, 283). All systemic diseases and infections which might cause such lesions, but be unrelated to such an insect bite, were ruled out by careful diagnostic tests (R. 285, 286). Dr. Ippolito testified that bacteria was introduced into this man's body from the insect bite, the insect itself having become infected first (R. 396, 397). As stated by Dr. Robin Anderson of the Cleveland Clinic on cross examination by respondent's counsel (R. 448):

> "Q. In other words, you found no medical explanation for his ulcers?
>
> A. Medical, again, from the standpoint of immediate cause. We still felt that it was on the basis of an insect bite."

ARGUMENT AND LAW.

1. Did the jury refuse to find that the work place was unsafe?

Respondent takes the position that the failure of the jury to answer question 13 of the special verdict (Ex. M, p. 52, pet. for writ) amounts to a finding as a matter of law against petitioner on the issue of unsafe place to work. This is exactly the issue that was before this Court in the case of *Harris v. Pennsylvania Railroad Company*, 361 U. S. 15 (1959) reversing 168 Oh. St. 582 (1959). Thus in *Harris*, although one of the specifications of negligence submitted to the jury for consideration was the failure of the railroad to furnish the petitioner a reasonably safe place in which to work, the jury, while finding specific negligence, failed to include a specific finding that the place of work was unsafe. The Supreme Court of Ohio took the position that the specific finding by the jury was insufficient to sustain petitioner's judgment. The court then held that the failure of the jury to find other negligence in answer to the special interrogatories was the equivalent of a finding against petitioner on these issues, relying upon *Masters v. New York Central Railroad Company*, 147 Oh. St. 293 (1947), certiorari denied 331 U. S. 836, rehearing denied, 332 U. S. 786. This Court flatly rejected such reasoning.

This Court has repeatedly held in actions under the Federal Employers Liability Act that a reviewing court must search the record and give weight to the factors and circumstances as a whole. *Union Pacific Company v. Hadley*, 246 U. S. 330 (1918); *Blair v. B. & O. Railway Company*, 323 U. S. 600 (1945). Further, this Court has held that where the jury rejects all specific claims of negligence but nevertheless finds generally negligence from the record, the same may be sufficient to support a verdict for the

petitioner. *Panhandle and Santa Fe Railroad Company v. Arnold*, 353 U. S. 360 (1957).

In the instant case, the jury did find specific negligence consisting of "permitting the existence of a pool of stagnant water on premises in the possession of and under the control of defendant into which was accumulated dead pigeons, rats and various forms of bugs and vermin." (Page 53 Petition for Writ of Certiorari, Exhibit Q.)

2. Was the failure of the jury to answer the questions on special verdict pertaining to foreseeability of injury the equivalent of a finding of no negligence as a matter of law?

Respondent vigorously pressed this point in its appeal to the Court of Appeals for Cuyahoga County and in its cross-motion to certify to the Supreme Court of Ohio. At best, however, this issue raises questions of Ohio procedural law as to the rendering of final judgment upon findings of fact by the jury. See Ohio Revised Code, Section 2315.17 (Page 30 respondent's brief).

As already noted in the original petition for writ of certiorari, the jury did find specific negligence and a proximate relationship between this negligence and petitioner's injury. Under Ohio law the question becomes one of whether the findings by the jury are inconsistent with the judgment for petitioner as rendered by the trial court, Ohio Revised Code, Section 2315.17. This question of Ohio law was carefully considered by the Court of Appeals for Cuyahoga County in its published opinion (Pages 38 and 39, Petition for Writ of Certiorari). Under Ohio law it is very clear that such answers of fact by the jury must be liberally construed to conform with the intent of the jury, *Klever v. Reid Brothers Express, Inc.*, 151 Oh. St. 467 (1949); *Elio v. Akron Transportation Company*, 147 Oh.

St. 293 (1947). The federal view is substantially the same. See *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., and The City Line, Ltd.*, No. 282, October Term, 1961, decided April 2, 1962, page 9:

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. *Arnold v. Panhandle & S. F. R. Co.*, 353 U. S. 360. Cf. *Dick v. New York Life Ins. Co.*, 359 U. S. 437, 446."

Respondent makes much of the fact that throughout the years that the cesspool existed no disease or injury was known to have occurred to any of its employees. It is clear, however, under the Federal Employers Liability Act that such will not exculpate respondent from liability, but at best is merely a circumstance for the jury to consider as evidence. *Chicago, Rock Island and Pacific Railway Company v. Lint*, 217 F. 2d 279 (1954). Likewise, the mere fact that the railroad maintained such right of way in accordance with its usual custom and practice will not serve to condone negligent conduct. *Urie v. Thompson*, 337 U. S. 163 (1949).

In the instant cause, the jury did find specific negligence as already alluded to, and further found such negligence to bear a proximate relationship with the resulting injuries and disabilities suffered by petitioner. The fact that the jury failed and neglected to attach to these findings the legalistic label of foreseeability would clearly, therefore, under the applicable authorities, not serve as a basis to deny petitioner his judgment where the findings as a whole are sufficient to support such a judgment and there is an evidentiary basis for same in the record.

Furthermore, it is questionable as to whether the so-called issue of foreseeabiilty is a determinative issue at all under the Ohio Special Verdict Statute, Ohio Revised Code, Section 2315.15 (Page 30 respondent's brief). Subsequent to the decision of the Court of Appeals for Cuyahoga County in the instant case, the Supreme Court of Ohio rendered its opinion in the case of *Miller v. McAllister*, 169 Oh. St. 487 (1959). The opinion in that cause sets forth a legally sufficient special verdict under Ohio Revised Code, Section 2315.15. From that opinion it seems quite clear that the *determinative* issue here is negligence. Exhibit P, Page 87, Petition for Writ of Certiorari, discloses that the jury specifically found the defendant "negligent in one or more of the particulars alleged in the petition," thus resolving this fundamental determinative issue in favor of petitioner.

CONCLUSION.

Examination of the record reveals a multiplicity of circumstances and probative facts to support the findings of the jury of specific negligence and a proximate relationship between same and the ultimate injuries of petitioner. Judgment for petitioner was rendered upon the special verdict of the jury by the trial court. Respondent itself seems to have grave doubts as to the propriety of the Court of Appeals for Cuyahoga County in reversing this judgment of the Trial Court and holding that no actionable case for submission to the jury was presented by the proofs. This is self evident from the brief of respondent which is devoted in great extent to attempting to reconcile the entry of final judgment in its favor by the Court of Appeals on the basis of the findings by the jury. However the opinion of the Court of Appeals makes it clear that its judgment is one of law as upon a directed verdict and not upon

the verdict of the jury. The weakness of respondent's position is manifest by the fact that on the truly determinative issues the jury did in fact find for the petitioner. The trial judge upon reviewing all of the special findings upon the special verdict of the jury, found the same sufficient under Ohio Law to entitle petitioner to judgment.

Respondent makes much of the testimony of its entomologist, a Dr. Stearns, who was flown in by respondent to testify upon a hypothetical basis from his home in Newark, Delaware, far removed from the scene of the occurrence (R. 626). Dr. Stearns admittedly had never visited the scene of the occurrence until a day or so before he testified, which was many years after it had occurred (R. 629). Many factors were brought out on cross-examination which would entitle the jury to completely disregard the testimony of Dr. Stearns. Clearly his credibility was solely one for the jury to pass upon.

Likewise, respondent again attempts to open for review before this court the procedural question of the form and adequacy of the hypothetical questions put before Drs. Ippolito and Anderson by petitioner in the trial court. These questions involve considerations of Ohio law, which were extensively briefed in the Court of Appeals for Cuyahoga County as well as in the Supreme Court of Ohio on the various motions to certify before that court. Again, the Court of Appeals for Cuyahoga County found no error prejudicial to respondent in these respects. Again, the record abounds with testimony by both doctors, who were vigorously cross-examined as to their basis for reaching their conclusions of a direct and proximate relationship between the condition in the cesspool and the disease with which petitioner is afflicted.

Respondent attempts to make much of the fact that the alleged insect was never identified so that no adequate

means was present from the record to ascertain its capabilities of producing the lesions complained of. Respondent even refers to petitioner's brief in the Court of Appeals where petitioner readily admitted that there was no evidence which would possibly enable the jury to identify the alleged insect. (See Page 14 respondent's brief). Respondent, however does not quote the immediately following sentence in the same brief, which is as follows:

> "Plaintiff (petitioner herein) has always contended that the identity of the particular insect is unnecessary anyhow since the negligence charged was not in having the insect as such, but in having the unsanitary conditions which infected plaintiff with his disease process."

As already reiterated many times, it is petitioner's fundamental theory of the case that one of the various insects feeding upon the putrid matter maintained by respondent in its cesspool transmitted a disease process to the body of petitioner, which has lead to his present physical condition of complete dependency and helplessness with constant and continuous hospital confinement.

Respectfully submitted,

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